

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DAVID LAMAR CLAYTON,

Defendant-Appellant.

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UNPUBLISHED

July 11, 1997

No. 186363

Berrien Circuit Court

LC No. 94-003206-FC

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ANDREY DANTAY WILLIAMS,

Defendant-Appellant.

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No. 186367

Berrien Circuit Court

LC No. 94-003652-FC

Before: Young, P.J., and Doctoroff and Cavanagh, JJ.

PER CURIAM.

Defendants were convicted by a jury of first-degree murder, MCL 750.316; MSA 28.548, assault with a dangerous weapon, MCL 750.82; MSA 28.277, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). Defendant Williams was also convicted of carrying a concealed weapon, MCL 750.227; MSA 28.424. Defendants filed separate appeals as of right, which were consolidated for our review. We affirm.

Defendants first challenge the joinder of their trials. Both defendants were charged with the murder of Sam Merriweather, assaults on David Gill and Corey Hall, and felony-firearm charges, all arising from the same criminal incident. Therefore, it was permissible to try them jointly, in the discretion of the trial court. MCL 768.5; MSA 28.1028; MCR 6.121(A); MCR 6.120(B). Public policy favors

joint trials in the interest of justice, judicial economy, and administration. *People v Hoffman*, 205 Mich App 1, 20; 518 NW2d 817 (1994). There being a strong presumption in favor of a joint trial, it was incumbent on defendants, as the parties opposing joinder, to make offers of proof to clearly, affirmatively, and fully demonstrate that their substantial rights would be prejudiced by joinder of their trials and that separate trials were the necessary means of rectifying the potential prejudice. *People v Hana*, 447 Mich 325, 346; 525 NW2d 682 (1994). Defendants failed to make the requisite showing below that their substantial rights would be prejudiced by joinder. Their defenses were neither mutually exclusive nor irreconcilable. *Id.* at 349. Nor was the tension between the defenses so great that the jury would have to believe one defendant at the expense of the other. *Id.* Defendants did not accuse the other of guilt while professing innocence for himself. Moreover, defendants' alibis were simply different, and the jury could have believed one, both or neither defendant, apparently choosing the latter. The trial court did not abuse its discretion in granting the motion for consolidation. *Id.* at 331, 346.

We further conclude that neither defendant was irretrievably prejudiced at trial by joinder. *Id.* at 355. Contrary to defendant Clayton's assertion that evidence linking him to the crime was "nonexistent," there was strong, positive evidence linking him to the crime. Defendant Clayton's assertions of prejudice resulting from defendant Williams' testimony at trial is unsupported by the record. His further claim that he was prejudiced by evidence of his association with Williams is without merit. This Court has held that this type of defense is not antagonistic where it is not dependent upon the assertion that the codefendant committed the crime. See *People v Tucker*, 181 Mich App 246, 251; 448 NW2d 811 (1989). We likewise find to be without merit Williams' claim that he was prejudice by the presentation of evidence linking the two defendants to the crime. The essence of this claim is that other evidence tending to establish that Williams participated in the crime contradicted Williams' alibi presented by Hall who testified that the person involved in the crime was not defendant Williams, but another individual named Andrey Williams. Again, Williams' alibi defense was not antagonistic to that of Clayton and joinder of the trials was not erroneous.

Defendant Clayton argues that the evidence was inadmissible hearsay and that the error in admitting the testimony was compounded by the prosecution's emphasis of the testimony in its closing argument. We disagree. The evidence was admissible as evidence of an individual's state of mind, i.e., whether one of the alibi witnesses had the intent to lie on the witness stand, MRE 803(3); *People v Fisher*, 449 Mich 441, 449; 537 NW2d 577 (1995), and was properly offered to rebut the alibi witnesses' testimony in this regard. See *Figgures, supra* at 399. Even if it is unclear which of the alibi witnesses made the statement, each of the alibi witnesses was confronted with the substance of the statement, denied that such a statement was made, and denied that she would lie for the defendants at trial. Therefore, its admission as a prior inconsistent statement of a witness also complied with the requirements of MRE 613.<sup>1</sup> Moreover, our review of the prosecutor's closing arguments regarding the rebuttal testimony reveals that his remarks were a fair summary of Kripps' testimony. The prosecutor was free to argue the evidence and all reasonable inferences from the evidence. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995).

Defendant Clayton lastly claims that he was denied the effective assistance of counsel based on his counsel's failure to object to the admission of Kripps' testimony and the prosecution's closing

argument. There being no error in the admission of the rebuttal testimony or in the remarks made by the prosecutor, defendant Clayton was not prejudiced by his counsel's representation so as to deny him either the effective assistance of counsel or a fair trial. *People v Pickens*, 446 Mich 298, 303; 521 NW2d 797 (1994).

Defendant Williams' only additional claim is a challenge to the sufficiency of the identification evidence against him. In support of his claim that the evidence was not legally sufficient, defendant Williams first asserts that David Gill's identification of Williams was inherently incredible. The credibility of identification testimony is a matter for the trier of fact to decide. *People v Daniels*, 172 Mich App 374, 378; 431 NW2d 846 (1988). Gill's testimony regarding his identification of defendant Williams was unequivocal and was sufficient to identify defendant Williams as one of the gunmen. Further, defendant Williams points to Hall's testimony that the Andrey Williams he saw at the shooting was a different person who was also named Andrey Williams. However, as previously noted, it was up to the jury whether to believe Hall. *Wolfe, supra*. More to the point, because we are reviewing the sufficiency of the evidence, we review the evidence in a light most favorable to the prosecution and need not consider Hall's testimony exculpating defendant Williams. *Wolfe, supra*. Finally, based on testimony by officers Diljack and Koza, paramedic Nelson, and Gill, the jury could find that the victim's dying declaration identified the instant Andrey Williams as one of the gunmen. Viewing the evidence in a light most favorable to the prosecution, we conclude there was sufficient evidence linking defendant Williams to the shootings to justify the jury finding him guilty of the crimes charged beyond a reasonable doubt. *Wolfe, supra*.

Affirmed.

/s/ Robert P. Young, Jr.

/s/ Martin M. Doctoroff

/s/ Mark J. Cavanagh

<sup>1</sup> Defendant Clayton's peripheral argument that admission of this testimony violated his right to confrontation because it was hearsay is rendered moot by our conclusion that the testimony was properly admitted.